No. 92-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS BEACH COMMUNICATIONS, INC., MAXTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION, AND WESTERN CABLE COMMUNICATIONS, INC.

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November 24, 1992

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SUPPLEMENTAL BRIEF OF RESPONDENTS BEACH COMMUNICATIONS, INC., *et al.*

Respondents Beach Communications, Inc., MaxTel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. (collectively, "Beach") submit this Supplemental Brief.[1]

ARGUMENT

NCTA'S ATTEMPT TO DIVINE A RATIONAL BASIS FROM THE FCC'S PRE-CABLE ACT REGULATORY POLICY FAILS ON ACCOUNT OF THE NCTA'S DISTORTION OF THAT REGULATORY POLICY.

A. The FCC's Pre-Cable Act Policy Does Not Provide A Rational Basis For The Cable Act's Distinction Between Video Systems Serving Commonly Owned Units And Video Systems Serving Non-Commonly Owned Units.

For purposes of local franchising required by the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §541(b)(1), the court of appeals found no rational basis for the distinction drawn between video systems which use wire to interconnect *commonly* owned build-

[1] Beach received the Petition For A Writ Of Certiorari on October 8, 1992. Thereafter, unbeknownst to Beach, Respondent National Cable Television Association, Inc. ("NCTA") filed a brief in support of the Petition. Under Rule 12.4, NCTA's Brief In Support of the Petition was due 10 days before the due date of Beach's Brief In Opposition, but Beach was not served with NCTA's brief until November 12, three days after Beach was required to file, and did file, its Brief in Opposition. (Counsel for Beach learned of the NCTA brief through the trade press while on an out-of-town business trip on November 12.) Thus, Beach has not had an opportunity to address NCTA's arguments. Rule 15.7 permits a party to file a supplemental brief to address "intervening matter not available at the time of the party's last filing." The NCTA brief constitutes such intervening matter. Moreover, this Supplemental Brief is the only means by which Beach can exercise its right under Rule 12.4 to address all briefs filed in support of the Petition.

ings and systems which use wire to interconnect *separately* owned buildings, 47 U.S.C. §522(6), and struck down that distinction as violating the equal protection guarantee of the Fifth Amendment. According to Respondent National Cable Television Association ("NCTA"): "The differing treatment accorded by Congress makes sense, based on the [Federal Communications] Commission's experience with commonly owned SMATVs and its reluctance to treat them as cable systems." NCTA Brief at 10.[2] NCTA argues that Congress intended to adopt the FCC's pre-Cable Act policy relating to SMATV, and that an examination of that policy reveals a rational basis for the discriminatory classification. NCTA Brief at 10. In fact, the FCC's pre-Cable Act policy with respect to SMATV offers no rational basis to support the arbitrary distinctions drawn by the Cable Act. Brief In Opp. at 7-10.

The FCC's pre-Cable Act policy with respect to franchising of *SMATV* systems begins and ends with *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"), *aff'd sub nom. New York State*

[2] SMATV uses a satellite receiving station and retransmission equipment, located wholy on private property, to obtain video programming signals transmitted by satellite, which are then converted and distributed by cable to tenants of the building or buildings served. *See New York State Commission On Cable Television v. Federal Communications Commission*, 749 F.2d 804, 806 (D.C. Cir. 1984) ("*NYSCCT*"). Thus, SMATV includes "wholly private" systems and "external, quasi-private systems," but not "internal systems." *See* Respondents' Brief In Opp. at 3-4 describing the nomenclature used by the court of appeals to identify the various video distribution systems at issue. MATV, or master antenna television, consists of a television antenna, usually located on the rooftop of a multiunit dwelling, which captures *only* over-the-air, broadcast television signals for delivery to tenants of the building and which obviates the need for individual antennas per tenant, an impractical solution for television reception. *NYSCCT*, 749 F.2d at 806. Accordingly, SMATV systems offer the full complement of video programming offered by traditional cable systems, while MATV systems are restricted to retransmission of local broadcast stations.

Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984) ("*NYSCCT*"). In *ESCOM*, the FCC preempted franchising of SMATV systems which make no use of public rights-of-way. *Id.* at 1234. Although the FCC found that local franchising impeded the growth of video delivery systems, *id.* at 1231, limited local regulation over traditional cable systems was justified by their use of public rights-of-way. *Id.* at 1234. Despite the technological similarity between traditional cable systems and SMATV, the FCC exempted SMATV systems from local franchising precisely because they do not use the public rights-of-way. *Id.*

There were no relevant FCC decisions relating to SMATV before the *ESCOM* decision, and Congress passed the Cable Act shortly after that decision and before its affirmance by the D.C. Circuit. Thus, NCTA's invitation to examine pre-Cable Act regulation of SMATV as a means of deducing a rational basis for the distinctions drawn by the Cable Act leads to the invalidation of those distinctions: the pre-Cable Act policy exempted facilities from local regulation based on their non-use of public rights-of-way and took no account whatsoever of whether the facilities being served were commonly or separately managed. Since *ESCOM* dealt with a SMATV system serving a single multiunit dwelling, the FCC did not address franchising of SMATV systems using wire to interconnect more than one multiunit dwelling until after passage of the Cable Act. *In Re Amendment of Parts 1, 63, and 76 of the Commission's Rules*, 58 Rad. Reg. 2d (P&F) 1, *modified*, 104 F.C.C.2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Therein, the FCC affirmed that "the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." 104 F.C.C. 2d at 397. In its Report to the

D.C. Circuit in this case, the FCC repeated its "policy preference" to exempt from local franchising systems which interconnect separately owned buildings by wire, as long as no public right-of-way is used. App. at 51a.

Contrary to NCTA's suggestion, FCC regulatory policy with respect to *SMATV* offers no rational basis on which to impose local franchising on SMATV systems using wire to interconnect separately owned multiunit dwellings.[3]

B. The FCC's Regulatory Treatment of MATV Systems, Upon Which NCTA Relies, Fails To Justify The Cable Act's Arbitrary Classifications With Respect To SMATV Systems.

While claiming to examine pre-Cable Act policy with respect to SMATV, NCTA actually relies on the FCC's application of the "common ownership, control, or management" language in the *MATV* context. That language was developed almost 30 years ago to distinguish MATV

[3] Although the FCC found that the plain language of the Cable Act compels this result, *Definition Of A Cable System*, 5 F.C.C. Rcd. 7638, 7641 (1990), until now it has never attempted to articulate a rational basis for it, except in its Report to the court of appeals, App. at 50a, wherein it adopted by reference, and without discussion, the bases proffered by Chief Judge Mikva in his concurring opinion. NCTA incorrectly states that the FCC "feared that expressing any additional policy justifications might lead to the court extending the cable system definition to cover facilities, such as those interconnecting *commonly* owned multiple unit dwellings by cable, that the FCC had never considered to be a cable system." NCTA Brief at 6, n.18. In fact, the FCC was not referring to the exemption for interconnection of multiple unit dwellings by cable, but rather to the exemption for *wireless* systems. *See* App. at 50a (citing the court of appeals' discussion of wireless systems found at App. 31a-32a, n.17). In short, the FCC was acknowledging that a system which interconnects non-commonly owned buildings by wire is, for franchising purposes, indistinguishable from a wireless system serving non-commonly owned buildings. As the FCC noted, Congress meant to exclude wireless systems from the franchising requirement, App. at 50a; therefore, under the Fifth Amendment, systems interconnecting buildings by wire must also be exempted.

systems from cable systems, *Rules Re Microwave-Served CATV*, 38 F.C.C. 683 (1965), *aff'd Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), and subsequently found its way into the Cable Act. The NCTA's approach actually proves the unconstitutionality of the classification at issue here, because the FCC's application of the "common ownership" language in the MATV context offers no rational basis for the disparate treatment of video delivery systems imposed by the Cable Act, despite the similarity of the "common ownership" language.

In 1965, the FCC imposed certain federal regulations upon "CATV systems" which served to retransmit only over-the-air broadcast signals, not satellite signals. 38 F.C.C. at 741. The FCC exempted from federal regulation MATV systems, *i.e.*, any "facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management . . . ." *Id.* at 741. That case marks the beginning of limited *federal* regulation of cable systems, but offers no conceivable basis for imposing local regulation, because local regulation was not at issue. The decision does not provide a rational basis for, or even discuss, its implicit distinction between systems serving a group of apartments under common control and systems serving apartments under separate control.

Similarly, NCTA cites *Cable Television Systems*, 63 F.C.C.2d 956 (1977), and *Cable Television System*, 67 F.C.C.2d 716 (1978), in which the FCC reaffirmed the exemption for MATV, noting that a landlord's use of a master antenna used in common for the reception of broadcast signals is "not a competitive entry into something like cable television service . . . ." *Cable Television System*, 63 F.C.C.2d at 996. NCTA cites this case for the proposition that, as early as 1976, "SMATVs providing service to *non-commonly* owned buildings presumably were believed to fall more on the line of a 'competitive entry' into cable television service," NCTA Brief at

11, as opposed to being mere "amenities," NCTA Brief at 14, thus allegedly justifying the imposition of local franchising requirements. This grossly distorts FCC policy since the case never mentions *SMATV* and does not discuss service to non-commonly owned buildings, even by MATV.[4]

In fact, the FCC and Congress greeted "competitive entry" by SMATV systems by *prohibiting* the imposition of local franchising requirements upon them. *ESCOM*, 95 F.C.C.2d at 1231 (preempting local franchising of SMATV as a means of "creating a more diverse and competitive telecommunications environment"). *Id.* at 1231-35. As Congress noted in adopting the Cable Act:

> [T]his bill does not affect the authority of a state or local political subdivision to license or regulate an SMATV system which does not use public right-of-way. Recently the FCC sought to preempt state regulation [citing *ESCOM*]. The committee does not intend anything in this title to affect the FCC's decision, or to affect any review of this decision by the courts.

H. Rep. No. 934, 98th Cong., 2d Sess. 63 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 ("H. Rep."). By adopting *ESCOM*, Congress recognized that a SMATV system serving a *single* multiunit dwelling represented competitive entry, and exempted such a system from local franchising. Since competitive entry justified an exemption from local franchising, it cannot be a conceivable basis for the imposition of franchising.[5]

[4]The decision's omission of any reference to SMATV is understandable given that the advent of SMATV did not occur until around 1979 when the FCC deregulated the licensing of the satellite receive-only antennas necessary to pick up SMATV programming. *See ESCOM*, 95 F.C.C.2d at 1231 citing *Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 F.C.C.2d 205 (1979).

[5]Congress' adoption of *ESCOM* belies NCTA's conclusory statement that Congress might have believed that systems serving

[footnote continued]

Congress did not intend "competitive entry" to be the basis for local franchising of *wireless* systems serving non-commonly owned buildings. *Definition Of A Cable Television System*, 5 F.C.C. Rcd. at 7638-39; *see In Re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 83 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982) (exempting wireless systems located wholly on private property from local franchising as a means of encouraging competitive development of wireless technology). Nor did Congress intend to impose franchising in the event of "competitive entry" by a SMATV operator who interconnects non-commonly owned buildings by radio or who serves numerous, non-commonly owned buildings by installing separate facilities at each property. *Definition Of A Cable Television System*, 5 F.C.C. Rcd. at 7639-40. Congress exempted these alternative delivery systems, all of which make no use of the public rights-of-way, from local franchising as a means of encouraging competition with traditional cable operators. *Id.* at 7639, citing H. Rep. at 22-23, and citing S. Rep. 67, 98th Cong., 1st Sess. 30 (1983). Since competitive entry was the basis on which alternative video delivery systems were *exempted* from local franchising, it cannot be a conceivable basis for *imposing* a franchise requirement.[6]

non-commonly owned buildings are more likely to "share the attributes of" traditional cable systems and therefore should be subject to local franchising. NCTA Brief at 13. To the contrary, Congress adopted *ESCOM*'s reasoning that the attributes which traditional cable operators share with video delivery systems located wholly on private property do *not* justify the imposition of local franchising on the latter since no use of the public right-of-way is made. *See supra* at 3.

[6]Although Congress intended to exempt these alternative systems from local franchising, all of them remain subject to extensive federal regulation. Therefore, NCTA is inaccurate when it repeatedly states that the effect of the court of appeals' decision

[footnote continued]

The latter *Cable Television System* decision does note that the MATV exception to the cable system definition is based, in part, on the inefficiency of regulating smaller systems. 67 F.C.C.2d at 726. Yet the decision does not explain how the "common ownership" language furthers this purpose. There is no suggesting that a system serving apartments which are commonly controlled is likely to have fewer viewers than a system serving apartments that are separately controlled.

As applied in the Cable Act with respect to *SMATV*, it is inconceivable that Congress included the "common ownership" language as a means of imposing the local franchising requirement on the basis of system size, in light of the fact that the Act does not prohibit a video provider from serving an infinite number of subscribers without obtaining a franchise. The Act does not even prohibit a SMATV provider from serving non-commonly owned buildings without a franchise; it merely prohibits the interconnection of those buildings by cable. The provider is free to offer service to a limitless number of multiunit dwellings by interconnecting them with radio waves, or by installing and operating separate systems on each property served. Likewise, under the Cable Act a single video provider can serve every tenant of every multiunit dwelling in the nation and never obtain a franchise, if the provider simply uses a wireless system and makes no use of the public rights-of-way. Congress's exemption of wireless systems from the franchise requirement regardless of the number of dwellings served proves that the cable system definition cannot conceivably have been intended to impose franchising on the basis of system size.[7]

is to increase the number of "unregulated" video delivery providers. *See* NCTA Brief at 11-12, 14, 15.

[7] NCTA avoids a discussion of the franchising exemption for wireless systems on the grounds that neither the court of appeals

[footnote continued]

NCTA cites three additional FCC cases holding that the cable system definition included MATV facilities which made no use of public rights-of-way. NCTA Brief at 10, n. 28 citing *Notice of Proposed Rulemaking in Docket No. 20561*, 54 F.C.C.2d 824 (1975) (MATV facilities serving planned communities); *Citizens Development Corp.*, 52 F.C.C.2d 1135 (1975) (MATV facility serving single family homes in private community); *Bayhead Mobile Home Park*, 47 F.C.C.2d 763 (1974) (MATV facility serving mobile home park). These cases were decided when the exception to the cable system definition exempted facilities serving "one or more apartment dwellings under common ownership, control, or management," and thus simply stand for the proposition that "apartment dwellings" do not include single-family homes or mobile home parks. They offer no rational basis to distinguish separately owned multiunit dwellings from commonly owned ones for purposes of requiring a local franchise.[8]

Thus, NCTA's observation that the arbitrary franchising requirements created by the Cable Act are "firmly grounded in FCC precedent," NCTA Brief at 14, misses

nor Petitioners addressed that issue. NCTA Brief at 5, n.13. NCTA is correct that the exemption for wireless operators is settled law, *Definition Of A Cable Television System*, 5 F.C.C. Rcd. at 7638-39, and has not been challenged in this case. But these are not reasons to ignore the exemption. Indeed, the absolute exemption for wireless systems, regardless of system size, proves that the congressional line-drawing contained in the Cable Act was not based on a desire to impose franchising on those systems of larger size.

[8] Similarly, NCTA mistakenly relies on the *post*-Cable Act decision in *Massachusetts Community Antenna Television Commission*, 2 F.C.C. Rcd. 7321 (1987), *appeal dismissed sub nom. Channel One Systems, Inc. v. FCC*, 848 F.2d 1305 (D.C. Cir. 1988), in which the FCC found that "multiple unit dwellings" do not include planned unit developments including single family homes, but again offered no rational basis to distinguish between video facilities serving separately owned dwellings and video systems serving commonly owned dwellings.

the point that such precedent did not involve SMATV, but rather MATV, and was silent with respect to any rational basis for discriminatory treatment of video systems serving separately owned dwellings.

CONCLUSION

Beach has shown herein and in its initial brief that the two "conceivable" bases proffered below to justify the distinction between wired video systems which interconnect commonly owned versus non-commonly owned buildings, *i.e.*, an intent to impose franchising on larger video systems, and an intent to encourage the use of radio waves, are not rational bases for the discriminatory classification. The distinctions drawn by the Cable Act cannot be justified on the basis of alleged governmental interests that are not furthered by the classification or that conflict with actual federal policy. Given the absence of a conceivable basis on which to distinguish systems using wire to interconnect commonly owned buildings and systems using wire to interconnect non-commonly owned buildings, the court of appeals properly ruled that the distinction does not withstand equal protection scrutiny under the Fifth Amendment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

For the foregoing reasons, Beach respectfully requests that the Court deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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